# Eleventh Circuit Precedent

## ASYLUM, WITHHOLDING, CONVENTION AGAINST TORTURE

*Sama v. Att'y Gen. of U.S.*, 887 F.3d 1225 (11th Cir. 2018).

The Eleventh Circuit denied the PFR, affirming the Board's finding that the petitioner did not suffer past persecution or have a well-founded fear of future persecution by the Cameroonian police on account of his political opinion supporting the gay community or imputed membership in the gay community. Substantial evidence also supported the Board's finding that the government was not unwilling or unable to control private actors where the Cameroonian police expressed interest in bringing the petitioner's attackers to justice and country reports indicated that conditions in Cameroon were improving with respect to the persecution of gay rights activists. The court reiterated that while the Board must consider all of the evidence, it need not specifically mention each claim or piece of evidence presented, and the court concluded that the Board did not violate the petitioner's due process rights where he was provided notice and an opportunity to be heard.

## ADJUSTMENT OF STATUS & WAIVERS

*Arevalo v. Att'y Gen. of U.S.*, 872 F.3d 1184 (11th Cir. 2017).

The Eleventh Circuit denied the PFR and granted *Chevron* deference to the Board's interpretation of section 212(h) of the Act in *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012), which held that an applicant for special rule cancellation of removal cannot use section 212(h) to waive her inadmissibility under section 212(a)(2) of the Act and overcome the bar to relief under section 240A(b)(2)(A)(iv) of the Act.

## BOND

None

## CANCELLATION OF REMOVAL

None

## CRIMINAL CASES IN THE IMMIGRATION CONTEXT

*Cintron v. Att'y Gen. of U.S.*, 882 F.3d 1380 (11th Cir. 2018).

The Eleventh Circuit granted the PFR and remanded, concluding that petitioner's conviction in violation of Fla. Stat. § 893.135(1)(c) (drug trafficking offense) does not disqualify her from cancellation of removal because the statute is indivisible and categorically overbroad and therefore does not qualify as an aggravated felony. Reaffirmed in *Francisco v. U.S. Atty. Gen.,* 884 F.3d 1120 (11th Cir. 2018).

*Pierre v. Att'y Gen. of U.S.*, 879 F.3d 1241 (11th Cir. 2018).

The Eleventh Circuit denied the PFR, concluding that the Board did not err in determining that petitioner is removable because his conviction in violation of Fla. Stat. § 784.085 (battery of a child by throwing, tossing, projecting, or expelling blood, seminal fluid, urine, or feces) is categorically a crime of child abuse under section 237(a)(2)(E)(i) of the Act. In doing so, the court granted *Chevron* deference to the Board's interpretation of "child abuse" discussed in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), and *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). In addition, the court held that the Board did not err in concluding that petitioner is ineligible for cancellation of removal because it agreed that his conviction is categorically a CIMT within the meaning of section 237(a)(2)(A)(i) of the Act.

*Choizilme v. U.S. Att'y Gen.*, 886 F.3d 1016 (11th Cir. 2018).

The Eleventh Circuit denied PFR concluding that a conviction for sale of cocaine in violation of section 893.13(1)(a)(1) of the Florida Statutes qualifies as an illicit-trafficking aggravated felony under the INA. The Eleventh Circuit agreed with the BIA's analysis in *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014), and concluded that "illicit trafficking" under § 1101(a)(43)(B) does not require a specific *mens rea* of knowledge of the illicit nature of the controlled substance being trafficked.

*Gordon v. Att'y Gen. of U.S.*, 861 F.3d 1314 (11th Cir. 2017).

The Eleventh Circuit granted the PFR, concluding that Fla. Stat. Ann. § 893.13(1)(a) (sale or delivery of cannabis) is divisible because selling and delivering a controlled substance are considered separate offenses in Florida, the latter of which would not constitute an aggravated felony under section 101(a)(43)(B) of the Act. The approved *Shepard* documents in this case did not disclose which offense petitioner had been convicted of, therefore the Board erred in not "presum[ing] that the conviction rested upon nothing more than the least of the acts criminalized" and in concluding that petitioner's crime was an aggravated felony.

*Gelin v. U.S. Att'y Gen.,* 837 F.3d 1236 (11th Cir. 2016).

The Eleventh Circuit denied the PFR, concluding that Fla. Stat. Ann § 825.102(1) for abuse of an elderly person or disabled adult is categorically a CIMT because the least culpable conduct

necessary to sustain a conviction under section 825.102(1) constitutes a CIMT. Thus, Petitioner's conviction categorically qualifies as a CIMT. Notably, the Court clarified that because Petitioner's conviction "categorically qualifies as a CIMT under the least culpable subpart of [section 825.102(1)]," it was unnecessary for the Court to determine whether section 825.102(1) is a divisible or indivisible statute.

*Spaho v. U.S. Att'y Gen.*, 634 F.3d 1333 (11th Cir. 2016).

The Eleventh Circuit denied the PFR, concluding that Fla. Stat. Ann. § Fla. Stat. Ann. § 893.13(1)(a) is divisible because the statute contains six alternative elements: sale, delivery, manufacture, possession with intent to sell, possession with intent to deliver, and possession with intent to manufacture; thus, the statute is divisible. The Court applied the modified categorical approach to determine which of the six alternative elements formed the basis of Petitioner's conviction. Because Petitioner's conviction was for "sale of a controlled substance," and "sale and possession with intent to sell" inherently involve commercial conduct, the Court concluded that Petitioner's conviction under section 893.13(1)(a)(1) was a categorical match to the illicit trafficking provision under INA § 101(a)(43)(B). The Court noted that although "[t]wo of the alternative elements of § 893.13(1)(a), sale and possession with intent to sell, are inherently commercial and qualify under the definition of an illicit trafficking aggravated felony," the other four alternatives "may not be commercial and may not qualify."

## CRIMINAL

*United States v. Joyner*, 882 F.3d 1369 (11th Cir. 2018).

The panel determined that resisting an officer with violence required that the state prove that a defendant "*knowingly and willfully resists*, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, *by offering or doing violence to the person of such officer*." (emphasis in the original). The panel noted that the Florida courts have held that "violence is a necessary element of the offense," reaffirming its precedent, *United States v. Hill*, 799 F.3d 1318, 1322 (11th Cir. 2015), in holding that resisting an officer with violence in violation of the Florida Statutes necessarily has as an element the use, attempted use, or threatened use of force against the victim. Therefore, it satisfies the elements clause pursuant to 18 U.S.C. § 924(e)(2)(B)(i). In turning to strong arm robbery, the panel determined that the state must prove that a defendant committed robbery, and in doing so did not carry a firearm, deadly weapon, or other weapon. Turning to Eleventh Circuit precedent, the panel adopted the reasoning in *United States v. Lockley*, 632 F.3d 1238, 1240, 1242–43 (11th Cir. 2011), in determining that a conviction pursuant to section 812.13(1) necessarily requires that the defendant committed robbery "by using force, violence, or an intentional threat of imminent force or violence against another coupled with an apparent ability to use that force or violence or by causing the person to fear death or great bodily harm."

*In re Welch*, 884 F.3d 1319 (11th Cir. 2018).

The Eleventh Circuit determined that Alabama's first degree assault, Ala. Code. § 13A-6-20(a) was divisible. Under the modified categorical approach the Court determined that Welch was convicted under subsection (a)(1) which was found to be a crime of violence under the "elements"

clause of the ACCA's 18 U.S.C. § 924(e)(2)(B), which is analogous to 18 U.S.C. § 16(a). Specifically, the court found that the statute's requirement of serious physical injury could not be accomplished without the use of physical force.

*United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018).

The Eleventh Circuit concluded it had not considered a full categorical analysis in *Saint Fleur*, it proceeded to the categorical approach to address the petitioner's contention that Hobbs Act robbery (and attempt) cannot be considered crimes of violence as the least culpable conduct does not include the use, attempted use, or threatened use of force as prescribed by section 924(c)(3)(A). The panel first found that Hobbs Act robbery is indivisible and that the "actual or threatened force, or violence, or fear of injury" represent means, rather than elements, to commit robbery. The Eleventh Circuit followed the "realistic probability test," and because the petitioner failed to provide any prior cases or evidence that would support his contention, the panel found that even robbery committed through fear of harm to the victim could not be accomplished by any conceivable means that did not involve, at minimum, a threat of force. Thus, the panel concluded that Hobbs Act robbery and attempt of the same are categorical crimes of violence pursuant to 18 U.S.C. § 924(c)(3)(A).

*United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017).

On rehearing en banc, the Eleventh Circuit affirmed the sentencing enhancement of the district court, concluding that Fla. Stat. Ann. § 784.041 (felony battery) constitutes a crime of violence under the elements clause of USSG § 2L1.2(b)(1)(A)(ii) (same as 18 U.S.C. § 16(a)).

*United States v. Davis*, 875 F.3d 592 (11th Cir. 2017).

The Eleventh Circuit held that Alabama's first degree sexual abuse statute in violation of Alabama Code § 13A-6-66 was divisible. The Court also found sexual abuse by forcible compulsion indivisible and not a violent felony under the elements of clause of the Armed Career Criminal Act (ACCA) as the sexual contact element could be satisfied by the merest touching, and the forcible compulsion element included an implicit threat not of violence but of some sort of disciplinary action, or taking advantage of a child who assumed that the conduct was acceptable, or because the child did not have the capacity to refuse.

*Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).

The Eleventh Circuit affirmed the district court's denial of petitioner's motion to vacate her conviction, concluding that petitioner's conviction for attempted carjacking, in violation of 18 U.S.C. § 2119(1) constitutes a crime of violence under both the use-of-force clause at 18 U.S.C. § 924(c)(3)(A) and the risk-of-force clause at 18 U.S.C. § 924(c)(3)(B). In doing so, the Eleventh Circuit joined the Second, Sixth, and Eighth Circuits in holding that the Supreme Court's void-for-vagueness ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), does not apply to the risk-of-force clause in 18 U.S.C. § 924(c)(3)(B).

*United States v. Garcia-Martinez*, 845 F.3d 1126 (11th Cir. 2017).

The 2009 Florida Statute for second degree burglary of a dwelling (Fla. Stat. § 810.02(3)) is not divisible, as it contains alternative means rather than elements of committing the offense. Therefore, the district court erred by applying the modified categorical approach to determine that the petitioner's conviction constituted a crime of violence under U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii).

*United States v. Green*, 842 F.3d 1299 (11th Cir. 2016).

The Eleventh Circuit concluded that the Fla. Stat. Ann. § 784.03 for battery is divisible and looked to *Shepard* documents to determine whether Green was convicted of "intentionally striking" or "intentionally touching" a victim. Specifically, the Court looked to Green's sentencing recommendation, which contained a written agreement for Green's *nolo contendere* plea. The Court concluded that the language "expressly incorporates" the arrest report as the factual basis for Green's plea. The arrest report "described the events leading to [Green's] arrest as violent and not merely involving an intentional unwanted touching" and indicated that Green had "struck another against his will." The Court observed that Florida is one of few states that require a factual basis for a *nolo* plea—although a defendant generally does not admit guilt by entering a *nolo* plea, a Florida court must determine "that a factual basis for the plea exists." In this case, Green signed a sentencing recommendation "expressly indicating his assent to the incorporation of the arrest report as the factual basis for his *nolo* plea." Thus, the Court concluded that *Shepard* documents show that Green was convicted under the "striking" element of § 784.03 and therefore was convicted of a "violent felony" under the Armed Career Criminal Act's elements clause.

*United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016).

The Eleventh Circuit concluded that the 2011 Georgia burglary statute (Ga. Code Ann. § 16-7-1) is a divisible statue that contains "alternative locational elements." It is therefore appropriate to apply the modified categorical approach to determine which locational element formed the basis of a conviction under the 2011 version of the Georgia burglary statute. The Court observed that § 16-7-1 "has three subsets of different locational elements, stated in the alternative and in the disjunctive," and each subset "enumerates a finite list of specific structures in which the unlawful entry must occur to constitute the crime of burglary"—thus, the statute contains alternative locational elements and effectively creates several different crimes. The Court looked to state case law to conclude that, indeed, a "Georgia prosecutor must select and identify the locational element of the place burgled . . . [which is] the hallmark of a divisible statute." That an indictment for Georgia burglary "must charge the type of place or location with such specificity" is further proof that the statute's "listing of alternative locations for committing a burglary constitutes an enumeration of alternative elements." Accordingly, the Court applied the modified categorical approach to conclude that the petitioner's burglary convictions involved "dwelling houses or buildings housing a business," which constitute generic burglaries under the ACCA's enumerated crimes clause.

*United States v. Seabrooks*. 839 F.3d 1326 (11th Cir. 2016).

The Eleventh Circuit held that 1997 armed robbery conviction under section 812.13 of the Florida Statutes is categorically a "violent felony" under the Armed Career Criminal Act's (ACCA)

elements clause. The panel narrowly agreed that based on the precedent in United States v. Lockley, 632 F.2d 1238 (11th Cir. 2011), Petitioner's 1997 armed robbery convictions under section 812.13 of the Florida Statutes qualify as violent felonies under the ACCA. In Lockley, the court observed that the least culpable conduct criminalized by the robbery statute was "taking by putting the victim in fear," which involved the use or threatened use of physical force. The court held that a robbery conviction under of section 812.13 of the Florida Statutes categorically qualifies as a "crime of violence" because it has as an element the "use attempted use, or threatened use of physical force against the person of another." Because, under Lockley, Florida robbery is categorically a crime of violence, the panel agreed that Petitioner's 1997 armed robbery convictions under section 812.13(2)(a) of the Florida Statutes qualify as violent felonies under the ACCA.

*United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016).

The Eleventh Circuit held that the Florida burglary statute is broader than the generic definition of burglary, and application of the modified categorical approach is not appropriate because the Florida burglary statute is not divisible. Thus, a conviction for burglary under Florida law does not qualify as a generic burglary offense and is not a "violent felony" under the Armed Career Criminal Act's enumerated clause. Unlike the generic definition of burglary, the Florida burglary statute does not require unlawful entry into a building as an element—the statute defines a building to include the curtilage of the building, and Florida jurors are never required to decide whether a defendant committed burglary by unlawfully entering a building rather than just its curtilage. The Eleventh Circuit observed that the Florida burglary statute "creates a single indivisible crime that includes non-generic burglary," which means "no crime under the statue can be assumed to be generic" and the modified categorical approach is not applicable. Accordingly, no conviction under the Florida burglary statute qualifies as generic burglary.

## OTHER

*Levy v. Att'y Gen. of U.S.*, 882 F.3d 1364 (11th Cir. 2018).

The Eleventh Circuit granted the petition for panel rehearing, withdrew its previous decision and concluded that petitioner's Fifth Amendment rights were not violated because former section 321(a) of the Act (1985) does not discriminate based on gender or legitimacy. The Court also rejected the petitioner's argument that former section 321(a) "unconstitutionally burdens his fundamental right to maintain a family unit."

*Alfaro v. U.S. Att'y Gen.*, 862 F.3d 1261 (11th Cir. 2018).

The Eleventh Circuit held that Petitioner's confinement in a rebel-controlled trailer in a jungle was not a "prison"; therefore, Petitioner did not make a material misrepresentation on his application for adjustment of status when he answered "no" to the question whether he had ever been "arrested, convicted, or confined to a prison."